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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ARMSTER HAMPTON, Defendant and Appellant.	C081875 (Super. Ct. No. SF076291B)

In this appeal we again consider whether a reduction of a felony to a misdemeanor pursuant to Penal Code section 1170.18[1] operates to vitiate a sentencing enhancement based on the former felony. Defendant insists that he is entitled to be resentenced in light of the reduction and appeals from the trial court's order denying that relief. We disagree and shall affirm.

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[1] Undesignated statutory references are to the Penal Code.

BACKGROUND

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal.

In 2003 a jury convicted defendant of robbery (§ 211) and felon in possession of a firearm (former § 12021, subd. (a)). (*People v. Hampton* (June 22, 2005, C046365) [nonpub. opn.].) The trial court sustained a prior serious felony (§ 667, subd. (a)) and prior prison term allegations (§ 667.5, subd. (b)), and sentenced defendant to 20 years four months in state prison.

On March 4, 2015, defendant filed a section 1170.18 petition to have a 1999 conviction for second degree burglary (§ 459) reclassified as misdemeanor shoplifting (§ 459.5). The motion also requested resentencing on the current conviction, claiming that the 1999 prior could not be used to support the prison prior based on it, and that the remaining prison priors, based on convictions in 1990, 1992, and 1993, would also be invalidated due to the five-year "washout" provision.

The trial court reclassified the second degree burglary conviction to shoplifting on August 6, 2015, but did not notify defendant until December 11, 2015. On December 28, 2015, and February 23, 2016, defendant requested the trial court issue an amended abstract of judgment eliminating the prison priors for the reasons stated in the initial petition. The People filed an opposition, and the trial court denied defendant's claim on March 25, 2015.

DISCUSSION

Section 1170.18, enacted as part of Proposition 47, the Safe Neighborhoods and Schools Act (the Act), provides in pertinent part: "A person who, on November 5, 2016, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to

request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k) (hereafter subdivision (k).) Since the prior prison term enhancement requires that defendant be convicted of a felony and have served a prison term for that conviction (§ 667.5, subd. (b)), this raises the question of whether a prior prison term enhancement based on what would now qualify as a misdemeanor conviction survives the Act.[2] Since the prison prior enhancement does not apply if the defendant remains free from prison custody and the commission of any new felony during any five-year period following the end of the prison term (§ 667.5, subd. (b); see *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229), reclassifying a felony to a misdemeanor may prevent applying the enactment to earlier convictions under this "washout" rule. (See *People v. Abdallah* (2016) 246 Cal.App.4th 736, 739-740, 742-743 (*Abdallah*).)

Defendant insists that a prior prison enhancement does not survive under the circumstances and claims that the trial court erred in not striking his prison priors.

Regrettably, for defendant's purposes, section 1170.18 does not apply retroactively. Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera*

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[2] This issue is currently before the California Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011.)

found that subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors,[3] should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes. (*Rivera,* at p. 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded that the felony status of an offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal.[4] (*Rivera,* at pp. 1094-1095, 1099-1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

Citing *People v. Park* (2013) 56 Cal.4th 782 (*Park*), *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), and *Abdallah*, *supra*, 246 Cal.App.4th 736, defendant

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[3] Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

[4] *Rivera* also noted the absence of any evidence that the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera, supra,* 233 Cal.App.4th at p. 1100 ["Nothing in the text of Proposition 47 or the ballot materials for Proposition 47—including the uncodified portions of the measure, the official title and summary, the analysis by the legislative analyst, or the arguments in favor or against Proposition 47—contains any indication that Proposition 47 or the language of section 117.18, subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction"].)

asserts that the text of subdivision (k) requires striking the prison prior. Neither the cited cases, nor any other, support that assertion.

In *Park*, the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b) could not subsequently be used to support an enhancement under section 667, subdivision (a). (*Park, supra,* 56 Cal.4th at p. 798.) Applying the reduction to eliminate an enhancement would be a retroactive application, which is impermissible under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*. "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park*, at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. "None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense." (*Park*, at pp. 799-800.) In the present case, defendant committed his current felonies before his prior convictions could be reduced to a misdemeanor; applying that reduction to eliminate the corresponding prior prison term enhancement would therefore be an impermissible retroactive application of the Act.

Park is not the only example of the Supreme Court finding that reducing a felony to a misdemeanor pursuant to section 17 is not applied retroactively. For example, if a defendant is convicted of a wobbler and is placed on probation without imposition of sentence, the crime is considered a felony "unless subsequently 'reduced to a misdemeanor by the sentencing court' pursuant to section 17, subdivision (b). [Citations.]" (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439 (*Feyrer*).) "If ultimately

a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." (*Id*. at p. 439.) It has therefore long been the rule regarding section 17 that "as applied to a crime which is punishable either as felony or as misdemeanor: 'the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter--the judgment not to have a retroactive effect . . . .' " (*People v. Banks* (1959) 53 Cal.2d 370, 381-382, quoting *Doble v. Superior Court* (1925) 197 Cal. 556, 576-577 (*Doble*).)

Defendant's reliance on *Flores* is similarly misplaced. The defendant in *Flores* was sentenced to prison following his conviction of selling heroin (Health & Saf. Code, § 11352), and his state prison sentence for that crime was enhanced by one year under section 667.5, subdivision (b). (*Flores, supra*, 92 Cal.App.3d at pp. 464, 470.) The enhancement was based on a prior felony conviction of possession of marijuana under Health and Safety Code section 11357. (*Flores*, at p. 470.) That statute had since been amended in 1975 to make possession of marijuana a misdemeanor. (*Ibid*.)

The *Flores* court noted that in 1976 the Legislature enacted Health and Safety Code section 11361.5, subdivision (b), which "authorize[d] the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1, 1976." (*Flores, supra*, 92 Cal.App.3d at p. 471.) Also in 1976, Health and Safety Code section 11361.7 "was added to provide in pertinent part that: '(a) Any record subject to destruction . . . pursuant to Section 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 which became final more than two years previously, shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person. . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity,

permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions occurring prior to January 1, 1976.' " (*Flores*, at pp. 471-472.) Based on these amendments, the court concluded that "the Legislature intended to prohibit the use of the specified records for the purpose of imposing any collateral sanctions," such as the prior prison term enhancement. (*Id.* at p. 472.)

Flores is inapposite because there is no similar declaration of legislative intent for full retroactivity either in the Act generally or section 1170.18 in particular. If the Act's drafters wanted to invalidate prior prison term allegations because the underlying felony was now a misdemeanor, they could have included legislative language like that discussed in *Flores*. They did not.

Nor are we persuaded by *Abdallah*. The defendant in *Abdallah* admitted the prison priors at a sentencing hearing after the effective date of Proposition 47. (*Abdallah*, *supra*, 246 Cal.App.4th at pp. 740-741.) At that same hearing, the trial court reduced the felony underlying one of the prison priors, a 2011 conviction for possession of methamphetamine (Health & Saf. Code, § 11377), to a misdemeanor pursuant to Proposition 47. (*Abdallah*, at pp. 740-741.) The Court of Appeal in *Abdallah* held that the prison prior based on the now misdemeanor conviction had to be stricken. (*Id.* at p. 749.) *Abdallah* is inapplicable to this case because it does not involve the retroactive application of section 1170.18. "This case is therefore distinguishable from recent cases holding that Proposition 47 does not apply retroactively to redesignate predicate offenses as misdemeanors for purposes of imposing sentencing enhancements where the original sentence was imposed before the enactment of Proposition 47. [Citations.]" (*Abdallah*, at p. 747.)

Defendant also seeks to distinguish section 17 from subdivision (k). He notes that under section 17, when a crime is punishable as a misdemeanor or felony it is a

"misdemeanor for all purposes" under various conditions including "[a]fter a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." (§ 17, subd. (b), (b)(1).) Relying on *Doble*, *supra*, 197 Cal. 556, defendant contends that those terms are key to understanding why section 17 is not given retroactive effect. Since subdivision (k) does not use terms like "after" or "when" to describe the treatment of offenses designated as misdemeanors, he concludes that it is thereby distinguished from section 17, rendering the cases declining to give retroactive effect to section 17 inapposite.

The defendants in *Doble* were charged with various crimes including six offenses punishable as misdemeanors or felonies. (*Doble, supra*, 197 Cal. at pp. 557-558.) At that time, the statute of limitations for all misdemeanors was one year. (*Id*. at p. 558.) Since the defendants were charged more than a year after the offenses, they contended that prosecution was barred. (*Ibid*.) The Supreme Court addressed an argument that the "for all purposes" language of section 17 would bar prosecution because a misdemeanor judgment would be given both prospective and retroactive effect. (*Doble,* at p. 575.) The Supreme Court rejected this reasoning, as it "ignores the language--'after a judgment imposing a punishment other than imprisonment in the state prison'--following the phrase 'shall be deemed a misdemeanor for all purposes.' " (*Id*. at p. 576.) The high court held: "A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section, the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter--the judgment not to have a retroactive effect so far as the statute of limitations is concerned." (*Doble,* at pp. 576-577.)

Although the Supreme Court gave effect to the term "after" in *Doble*, that term is not necessary to preclude giving retroactive effect to the phrase "for all purposes." The

term "after" is used only in the provision of section 17 addressing an initial misdemeanor sentence, section 17, subdivision (b)(1). More analogous to subdivision (k) is section 17, subdivision (b)(3). Under this provision, a felony conviction will be treated as a misdemeanor for all purposes "[w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17, subd. (b)(3).) This provision was at issue in *Park* and *Feyrer*, and, as previously stated, was not given retroactive effect in those cases. (See *Park, supra*, 56 Cal.4th at pp. 787, 802; *Feyrer, supra*, 48 Cal.4th at p. 439.) Subdivision (k) operates in the same manner, treating a felony conviction as a felony until it is reduced to a misdemeanor under section 1170.18. "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k).) Under the language of subdivision (k), a felony subject to Proposition 47 remains a felony *until* it is reduced to a misdemeanor pursuant to section 1170.18. As with section 17, subdivision (b)(3), reducing the felony to a misdemeanor pursuant to section 1170.18 is not given retroactive effect.

Defendant's claims based on the various rules of statutory construction fare no better. Subdivision (k) states that an offense reduced to a misdemeanor "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." Citing the maxim *expressio unius est exclusio alterius*, "under which 'the enumeration of things to which a statute applies is presumed to

exclude things not mentioned' [citation]" (*Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 89-90), defendant claims that if the electorate intended for there to be other exceptions to the "for all purposes" language, it would have included them in section 1170.18.

The expression of a limitation on how the misdemeanor designation applies once it has been established, however, does not clearly and compellingly imply that the electorate thereby intended to place no limitation on when the designation applies in the continuum of time. This is particularly true where, as here, the same language was held by the Supreme Court not to apply retroactively. The Act's retroactivity is addressed in subdivision (a) of section 1170.18, which lists the provisions subject to the Act's retroactive application. Notably absent from that list is the prior prison term enhancement. As with *Park*, *supra*, 56 Cal.4th 782 this particular argument of defendant's actually supports a contrary interpretation of the Act.[5]

Defendant's reliance on the Act's broad purpose "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and [to] support programs in K-12 schools, victim services, and mental health and drug treatment" (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70), as well as its provision for liberal interpretation (*id*. at § 18, p. 74), is also misplaced.

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[5] Another case cited by defendant, *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, held that reducing an offense to a misdemeanor requires removing the defendant from the DNA database because the restrictions on firearm possession was the only exception recognized under section 1170.18. (*Alejandro N.*, at p. 1227.) *Alejandro N. v. Superior Court* is no longer valid as it was overruled legislatively on this point. (§ 299, subd. (f); see *In re C.B.* (2016) 2 Cal.App.5th 1112, 1118-1120.)

"[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice--and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' [Citation.]" (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526 [94 L.Ed.2d 533, 538]; accord *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) This is true even where legislation calls for "liberal construction." (See, e.g., *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1510 [workers' compensation law].) The essence of lawmaking is the choice of deciding to what extent a particular objective outweighs any competing values, and a court in the guise of interpretation should not upset this balance where it is spelled out in the text of a statute. (*County of Sonoma,* at p. 48.) The statements of purpose in the Act cannot be invoked to create a retroactive application that the text of the Act does not support.

Defendant's reliance on *In re Estrada* (1965) 63 Cal.2d 740 in support of Proposition 47's purpose in reducing punishment fares no better. *In re Estrada* held that if an amended statute mitigates punishment, the amendment will operate retroactively to impose the lighter punishment unless there is a saving clause. (*In re Estrada,* at p. 748.) The reason for this rule was that " '[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.' " (*Id.* at p. 745.) While the electorate intended to reduce penalties for crimes when it passed the Act, it did so only for those crimes the Act specifically covers. Retroactivity is limited to the procedures set forth in section 1170.18, which in turn applies to the offenses specifically addressed by

the Act. The prior prison term enhancement is not one of those provisions, and therefore is not subject to the Act's retroactive application.

Defendant's citation to the rule of lenity, "whereby courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor" (*People v. Avery* (2002) 27 Cal.4th 49, 57), is inapplicable here because its application is premised on an ambiguity that is not present in this part of the Act. " 'The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.' [¶] Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Id.* at p. 58.)

Defendant's final argument is that the prison priors should be stricken on equal protection grounds.

Whether a legislative body can limit the retroactive application of a change in the law reducing punishment for crime is a settled question. "[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [55 L.Ed. 561, 563].) This also applies to changes in sentencing law that benefit defendants. "Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court." (*People v. Floyd* (2003) 31 Cal.4th 179, 188.)

As with his other arguments, defendant's reliance on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) is misplaced. The Supreme Court held in *Kapperman* that a change in the law giving presentence credit for felons transferred to prison after a certain

date could not be applied prospectively because it did not serve "a rational and legitimate state interest." (*Id*. at pp. 546, 550.) *Kapperman* "does not stand for the broad proposition that equal protection principles require that all persons who commit the same offense receive the same punishment or treatment without regard to the date of their misconduct." (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 669.) As this court stated: "The *Kapperman* court took pains to point out its decision did not apply to laws reducing punishment for crimes. 'Initially, we point out that this case is not governed by cases [citation] involving the application to previously convicted offenders of statutes lessening the punishment for a particular offense. The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]' [Citation.] Therefore, *Kapperman* does not prevent the prospective application of a statute reducing punishment for a crime. [Citations.]" (*People v. Lynch* (2012) 209 Cal.App.4th 353, 360.)

A statute that "substantially changes the legal consequences of past events" is not applied retroactively absent clear legislative intent to do so. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) There is no evidence of a legislative intent to apply subdivision (k) retroactively. This is particularly true where, as here, the closely analogous language in section 17 has not been given a retroactive application. "Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears." (*Estate of Griswold* (2001) 25 Cal.4th 904, 915-916.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." (*In re Harris* (1989) 49 Cal.3d 131, 136.)

Since Proposition 47 is not intended to apply retroactively to prior prison term enhancements, the trial court correctly denied defendant's petition.

DISPOSITION

The judgment (order) is affirmed.

RAYE, P. J.

We concur:

HULL, J.

HOCH, J.